UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/828
1 August 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 828

Case No. 916: SHAMAPANDE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mikuin Leliel Balanda, Vice-President; Mr. Julio Barboza;

Whereas, at the request of Yorbert K. Shamapande, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 January, 29 April, 31 July and 31 October 1994 and 31 January 1995;

Whereas, on 31 January 1995, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal successively extended the time-limit for the filing of a corrected application with the Tribunal until 30 September and 31 December 1995 and 30 June 1996;

Whereas, on 22 March 1996, the Applicant filed an application containing pleas requesting the Tribunal, inter alia:

> "(9) ... to hold, pursuant to its earlier decision in Judgement No. 447, Abbas and pursuant to [the] Staff Regulations, in particular regulation 4.2, that 'the fullest regard' was not given by the Respondent to the Applicant's

qualifications in filling Vacancy announcement No. 91-E-DGD-074-NY, in DESD [Department for Economic and Social Development], ...

...

(11) ... to declare that ... the sum of $65,000.00, as requested by the Applicant, constitutes a much more reasonable award of compensation [than the $3,000.00 awarded by the JAB] in the circumstances.

(12) ... to hold that DESD violated relevant provisions of the United Nations Charter and Staff Rules and Regulations, in particular Article 101 of the Charter with respect to 'Paramount Consideration' and staff regulation 4.4 dealing with 'Fullest Regard' being given to qualifications and experience in filling of vacancies within the United Nations.

(13) ... [to recognize] the solemn obligations of the Secretary-General of the United Nations under the Charter of the United Nations, in particular Article 101, [and the] Staff Regulations, in particular regulations 4.2 and 4.4 and staff rule 104.14(a)(ii).

(14) ... to rescind the administrative decision of selecting a candidate with inferior qualifications which were not exclusively in the economic field as called for by the vacancy announcement.

(15) ... to direct the Secretary-General of the United Nations to ratify the Applicant's contractual and procedural rights [that were] violated by promoting him against the contested D1 post in DESD or placing him against another suitable post at [the] D1 level within the Organization, effective 25 June 1992, the date on which he was provisionally short-listed for a D1 post in DESD.

(16) ... to direct the Secretary-General of the United Nations to pay to the Applicant the initial compensation assessed by the JAB in the amount of three thousand United States dollars (US$3,000) for injuries sustained by the Applicant."

Whereas the Respondent filed his answer on 21 June 1996;

Whereas, on 16 July 1997, the Tribunal put questions to the Respondent, to which he provided answers on 21 July 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 January 1980, as an Economic Affairs Officer in the Office of the Commissioner for Namibia (OCN), on a fixed-term appointment, at the P-3, step I level. His appointment was successively extended for the duration of his assignment to OCN. He was promoted to the P-4 level on 1 April 1982, and to the P-5 level, with the title of Senior Economic Affairs Officer, on 1 October 1987. With effect from 1 January 1992, he was transferred to the Department of Public Information (DPI) and his functional title changed to Senior Information Officer. On 1 April 1992, his appointment became permanent.

On 5 February 1992, the Applicant submitted his application for the D-1 post of Principal Economic Affairs Officer in the Office of the Director-General for Development and International Economic Co-operation, as advertised in Vacancy Announcement #91-E-DGD-074-NY. Under the vacancy management procedures then in effect, the applications were evaluated by both DESD and the Office of Human Resources Management (OHRM) and then sent to the Appointment and Promotion Board (APB), which short-listed the Applicant and three other internal candidates.

On 30 June 1992, the Recruitment and Placement Officer, Professional Staffing Service, OHRM, wrote to the Applicant, informing him that he had been put on the provisional short list for the post. On 10 July 1992, the Applicant availed himself of the opportunity to submit additional information with regard to his candidacy. On 7 August 1992, the APB forwarded a final short list of five candidates, including the Applicant, to DESD.

On 2 October 1992, the Acting Deputy Executive Officer, DESD, informed the Director, Recruitment and Placement Division, OHRM, that DESD had selected another candidate for the D-1 post. On

7 October 1992, the Recruitment and Placement Officer, OHRM, informed DESD that OHRM had approved the selection. She also informed the Applicant.

In a letter dated 6 November 1992, to the Secretary-General, the Applicant requested an administrative review of that decision. Having received no reply, the Applicant, on 4 January 1993, lodged an appeal with the Joint Appeals Board (JAB), requesting a suspension of action, under the terms of staff rule 111.2(c).

The JAB adopted its report on 29 January 1993. Its considerations and conclusions read as follows:

> "Considerations
>
> 14. The Panel determined that there were two necessary conditions to be met for a recommendation to be made for a suspension of action:
>
> (a) the administrative decision in question had not already been implemented; and
>
> (b) [that] the administrative decision is, in fact, the subject of the appeal.
>
> The first condition had not been met. The action in question, the selection of the candidate, had been completed. The selection decision was implemented by 12 October 1992 when a P-5 form was issued assigning the chosen candidate to the post. Therefore, the Panel is unable to recommend that the act of selection be stayed."

On 3 February 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your request in the light of the Board's report. He has noted that the Board made no recommendation in its support since the action in question had already been implemented. Accordingly, the Secretary-General has decided that your request cannot be accepted."

On 23 June 1993, the JAB adopted its report on the merits of the Applicant's appeal. Its considerations and recommendation read, in part, as follows:

"Considerations

12. ... the Panel reviewed the material before it to determine (a) whether there was evidence of prejudice or other extraneous factors in that process, and (b) whether there were any procedural flaws which might have affected Appellant's rights. With respect to (a), the Panel concluded that Appellant had failed to produce any evidence of prejudice or other extraneous factors.

13. ... The Panel was convinced - with one reservation - that the procedures had been fully respected up through the APB decision establishing the final short-list. That reservation concerned the job description of the contested post. The Panel regretted Respondent's failure to provide it, despite its repeated requests, with a copy of the completed and approved job description, thus depriving it of the opportunity to confirm factual information supplied by Respondent. Where the Panel was able to cross-check documents, it discovered two factual errors in Respondent's submissions. The first is in the first sentence of paragraph 7 of the Respondent's reply (...); the second in para. 1(e) of [the Representative of the Secretary-General]'s memorandum. These errors may well be inconsequential, but they do serve to illustrate that mistakes are made. The Panel could not independently confirm that there were no mistakes at that early stage in the process.

14. It is precisely at the final stage of consideration to which Appellant addresses his allegations that the Panel found a procedural flaw. It had only assertions - by the Acting Deputy Executive Officer, DESD, and by Respondent - that the qualifications of all the candidates were carefully reviewed in DESD. To paraphrase UNAT Judgement #447: Nothing was known about how the final selection was made, how the candidates' worth was assessed and who assessed [the candidates] and with what result. Guided by the Tribunal's observations, the Panel requested Respondent to submit internal DESD material which might elucidate the process of consideration. No material was submitted, nor was any explanation or description of the assessment process.

15. As in the matter of the job description, the Panel was disturbed by Respondent's failure to respond. That failure was susceptible of two interpretations:

(a) The facts necessary to establish Respondent's full respect for Appellant's procedural rights do not exist, or

(b) Respondent did not see fit to make them available to the Panel.

In any event, the burden of proof is on Respondent, and Respondent did not provide that proof to the Panel. Following the reasoning of UNAT Judgement No. 447, the Panel need not conclude that Appellant would have automatically been selected for the post in order to conclude, as it does, that he had been denied due process.

Recommendation

16. The Panel recommends that Appellant be paid compensation for the injury suffered in the amount of three thousand dollars ($3,000.-)

17. The Panel makes no further recommendation with respect to this appeal."

On 16 July 1993, the Applicant was advised by the Under-Secretary-General for Administration and Management of the Secretary-General's decision on the JAB's recommendation:

"The Secretary-General has carefully reviewed the recommendation of the JAB as contained in paragraph 16 of its report to pay you the sum of $3,000 as compensation for injury suffered. The Secretary-General does not agree to this payment. He is convinced that no injury has been suffered by you and your rights under the Staff Rules and Regulations were not violated, to warrant payment of [an] indemnity.

It is also noted in paragraph 12 of the report, the Board's conclusion that no evidence had been produced to show prejudice or other extraneous factors in the selection process.

It is noted further that the Appointment and Promotion Board has considered your candidature which resulted in including you in a final short-list of five candidates, which was submitted to the then Department of Economic and Social Development (DESD) for final selection. DESD selection was approved by OHRM in accordance with the system of promotion prevailing at that time.

The Secretary-General, therefore, does not feel that there was any injury sustained by you or by any of the other candidates who were, like yourself, short listed by the Appointment and Promotion Board.

For the above reasons, the Secretary-General rejects the above recommendation of the JAB."

On 22 March 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration did not give full and fair consideration to his qualifications in filling the D-1 post in DESD, which constitutes a violation of the Charter and the relevant Staff Rules and Regulations.

2. The decision to select another, less qualified, candidate for the post in question was motivated by prejudice against the Applicant or other extraneous factors and denied the Applicant due process.

Whereas the Respondent's principal contentions are:

1. Selection and appointment is within the discretion of the Secretary-General. A staff member does not have a right to promotion, but only a right to consideration for promotion.

2. The decision not to select the Applicant was not motivated by prejudice or other extraneous factors.

3. The Applicant's procedural rights were fully respected and there was no violation of due process.

The Tribunal, having deliberated from 16 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant was a staff member at the P-5 level, who applied to fill the D-1 vacancy of Principal Economic Affairs Officer. According to the job description, the post required a specialization in economics, particularly focused on "African economic recovery and development, ... with a view to advising the Director-General and the ASG [Assistant Secretary-General] in an authoritative manner." Under the vacancy management procedures then in effect, the applications for the post were reviewed by the Department for Economic and Social Development (DESD) and the Office of Human Resources Management (OHRM), before being sent to the Appointment and Promotion Board (APB), which short-listed the Applicant and three other candidates. DESD's final decision was in favour of another candidate from that list.

II. The Tribunal notes that neither the Applicant nor the Joint Appeals Board (JAB) finds any flaw, procedural or otherwise, up to the moment when the APB forwarded a final short list of five candidates, including the Applicant, to DESD, on 7 August 1992. The Applicant's appeal focuses on the procedure by which DESD selected the successful candidate for the post.

III. The Applicant argues that the successful candidate's qualifications and experience were not exclusively in the field of economics, as required by the vacancy announcement and, to the extent that the chosen candidate had economic training and experience, they were demonstrably inferior to the Applicant's. Based on what he perceives as a disparity between the successful

candidate's level of qualifications and his own, the Applicant alleges that the selection process was unfair and inequitable.

IV. The Respondent contends that the Applicant has no right to be selected for any particular post, since the power of selection is within the discretion of the Secretary-General. He asserts that the Applicant's procedural rights were fully observed and that the Applicant has produced no evidence of prejudice or extraneous factors which would vitiate the Secretary-General's decision to choose another candidate for the post. The Tribunal notes that evidence of prejudice or extraneous factors must be provided by the Applicant. The Tribunal agrees with the JAB that, in the present case, the Applicant has not provided such evidence.

V. The Tribunal also recalls that the discretion of the Secretary-General to select the candidate that he considers the most suitable for the vacant post is also subject to the provisions of staff rule 4.2 and Article 101 of the Charter. The latter provides that "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

VI. The Tribunal has held repeatedly that, in order to effect the foregoing purpose, it is indispensable that "full and fair consideration" should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue. In Judgement No 362, Williamson (1986), the Tribunal held that:

> "... since the staff member has a statutory right to have 'the fullest regard' given to his candidature, the burden of establishing the Administration's failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at

> least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave its 'fullest regard' to it."

The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfiled. In Judgement No. 447, Abbas (1989), the Tribunal further specified that "reasonable" and "measurable" were the standards applicable in such cases: "... such consideration should to some measurable degree meet the criterion of 'fullest regard' in a reasonable manner."

VII. The Tribunal recalls that the JAB requested the Respondent "to submit internal DESD material which might elucidate the process of consideration". The JAB noted that "it [the JAB] had only assertions - by the Acting Deputy Executive Officer, DESD ... - that the qualifications of all the candidates were carefully reviewed in DESD." In order to ascertain whether the Respondent had in fact given the Applicant requisite consideration for the post, the Tribunal requested the Respondent to provide a description of "how DESD 'carefully reviewed the qualifications and seniority of the candidates'" and ultimately selected the successful candidate. The Tribunal further requested the Respondent to provide it with "any relevant documents, such as minutes of meetings, internal communications, notes and any other pertinent material." In reply, the Respondent advised the Tribunal that "the Department has no additional documents on this case beyond those that have already been provided to the JAB and form part of the JAB file. We have also been advised by [the Executive Officer, DDSMS] that the Department has no other statement to make in respect of its assessment of the qualifications and seniority of the candidates for

the post in question, beyond what has been indicated in the memorandum of 10 December, 1992 from [the Executive Officer, DDSMS] to [the] Chief Administrative Review Unit, concerning this case."

VIII. The Tribunal considers that the memorandum of 10 December 1992 has considerable bearing on the case. This memorandum states that the Applicant had been given full and fair evaluation among the 16 candidates for the post, three of whom met all the requirements. It then goes on: "The substantive evaluation of [the Applicant] reads as follows: 'The strength of the [Applicant] is professional experience in his involvement in African economic issues, in particular in directing, coordinating and administering multidisciplinary economic programmes for Namibia and Southern Africa countries. The [Applicant] also has strong multidisciplinary experience and skills in dealing with high level Government officials and delegations. The [Applicant]'s knowledge of system-wide coordination, global, economic issues and policies is satisfactory though [sic] exposure to adoption; review and implementation of UNPAAERD [UN Programme of Action for African Economic Recovery and Development] and Medium-Term Programme for Africa is missing.' Although [the Applicant] met all the requirements of the post, the selected candidate, ..., had an edge over him in programming procedures and in implementation of UNPAAERD, besides the fact that he was already working in the Africa Economic and Recovery Development." (Emphasis in original)

IX. The Tribunal presumes that this document, which was addressed to the Representative of the Secretary-General before the JAB, at her request, should have been made available to the JAB. If it was not available to the JAB, it should have been, for it is the Respondent's duty to transmit all pertinent evidence in his

possession to the JAB. The Tribunal, however, did not receive this document until it put a question to the Respondent.

X. The Tribunal notes that the JAB, in its report, made a statement that the Respondent had not provided "any explanation or description of the assessment process." The Tribunal finds, however, that the memorandum of 10 December 1992 provides at least a "minimal showing" that the Respondent gave the Applicant "full and fair consideration" for the post in question. This memorandum demonstrates that the Respondent reviewed the Applicant's abilities and his curriculum vitae and that he was deficient in an area that the selected candidate was not. Further, the memorandum sets forth the criteria on the basis of which the successful candidate was selected.

XI. The Tribunal cannot, and will not, substitute its judgement for that of the Secretary-General. Further, it is not for the Tribunal to establish whether the criteria for the selection of a candidate should have been different. However, the Tribunal believes that in the future, the recommendation of the JAB mentioned in Judgement No. 447, Abbas should be followed in all cases of selection for vacant posts in the Administration: "... the Joint Appeals Board recommended ... 'that future selection procedures of D-2 appointments include written records on the evaluation of candidates'." The Tribunal considers that more complete records of the deliberations of the selection bodies would improve provide better evidence of a "minimal showing" that consideration has been given to a candidate for a post.

XII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mikuin Leliel BALANDA
Vice-President

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

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AT/DEC/829
1 August 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 829

Case No. 921: MARTIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mikuin Leliel Balanda, Vice-President, presiding; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 30 January 1996, Vincent Martin, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 May 1996, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"...

3. ... to hold that but for the continued denial and unjustified selection, I would have been a legitimate candidate for promotion to the P-4 level on two occasions.

4. ... [to order] adequate compensation ... in my favour, bearing in mind the grave mental anguish and embarrassment caused to me due to this prejudicial, bias[ed] and discriminatory decision taken against me and material injury sustained by me and my family and the negative effect this will have on my future career in the United Nations.

5. ... [to] recommend that I be granted compensation in the form of an equivalent post (in grade/step and with retroactive effect) for the discriminatory, prejudicial and bias[ed] administrative decision taken against me by the authorities in order to promote a much junior candidate with no U.N. experience in the field of vacancy."

Whereas the Respondent filed his answer on 20 June 1996;

Whereas the Applicant filed written observations on 16 July 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 9 August 1982, as an Associate Administrative Officer, on a two year fixed-term appointment, at the P-2, step IV level, with the Office of General Services (OGS), Purchase, Transportation and Commercial Services Division, Transportation Section, Traffic Unit. On 1 September 1984, his appointment was converted to a probationary appointment. On 1 April 1985, he was promoted to the P-3 level, with a change in his functional title to Administrative Officer. On 1 June 1985, he was granted a permanent appointment. On 2 March 1992, he was temporarily reassigned to OGS, Transportation Section, Travel Unit, as Officer-in-Charge. On 1 July 1992, he was reassigned to OGS, Freight Forwarding Unit (FFU), with a change in functional title to Chief of Unit, FFU. On 1 November 1992, he was temporarily assigned to the United Nations Protection Force in Yugoslavia. On 27 June 1993, he was temporarily assigned to the United Nations Transition Authority in Cambodia. On 21 March 1994, he returned to OGS from his mission assignment.

On 7 February 1994, the P-4 post of Chief, Traffic Unit, Department of Administration and Management, OGS, was advertised for internal recruitment. The Applicant applied for the post.

On 30 May 1994, the Departmental Panel met to examine the records of the staff members who qualified for promotion to the P-4 level. It concluded that a staff member other than the Applicant was the most suitable candidate for the post.

On 28 June 1994, the Associate Recruitment and Placement Officer, Office of Human Resources Management (OHRM), informed the Applicant that he had not been recommended by his department for the post.

On 5 July 1994, the Applicant wrote to the Appointment and Promotion Committee, requesting that the Committee reconsider his "credentials and determine if [his] department/office's decision [was] justified."

On 14 September 1994, the Secretary, Appointment and Promotions Board and Committee, wrote to the Applicant and informed him that, notwithstanding the additional information contained in his letter of 5 July 1994, he had not been selected for the post.

On 18 November 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 9 November 1995. Its considerations, conclusions and recommendations read, in part, as follows:

> "...
>
> 30. The Panel confirmed that the Joint Appeals Board cannot substitute its judgement on performance evaluation, or any other criteria for promotion, for that of the appointment and promotion bodies. However, the discretionary decision of the Secretary-General may be challenged on the ground that extraneous factors such as prejudice, discrimination, lack of due process, or a breach of procedure vitiated the contested decision.
>
> 31. The Panel observed that with regard to consideration for a post, the Administrative Tribunal has consistently found that failure by the Administration to take a staff member's candidature into consideration would constitute a violation of the staff regulation; in particular staff regulation 4.4 (see Judgement No. 310, Estabial, No. 362, Williamson and No. 447, Abbas). The Panel observed from the records that the Appellant's candidature was considered by the Appointment and Promotion Committee (APC). The Panel noted that the APC had before it all the necessary documentation to enable it to assess the Appellant's qualifications and experience. The Panel noted further that the APC also had before it the Appellant's memorandum dated 5 July 1994 to the Chairperson of the APC which contained additional information.
>
> 32. The Panel also requested the Chairperson of the APB [Appointment and Promotion Board], under staff rule 110.2(1), to communicate to its Chairperson, the documents relating to

the APB/APC consideration of the Appellant. In response the Panel was provided with the Recruitment File corresponding to the post in question.

33. The Panel, after reviewing the above-mentioned material, found that the Appellant had been properly considered by the appointment and promotion bodies. The Panel also found that the selection process for the post in question had been properly handled. The Panel was not able to find any irregularity in the consideration of the Appellant by the appointment and promotion bodies.

Conclusions and recommendations

34. The Panel concluded that the candidature of the Appellant for the post in question had been given full and fair consideration.

35. The Panel also concluded that the decision not to select the Appellant for the post in question had not violated his rights including the right to due process.

36. Accordingly, the Panel makes no recommendation in support of the appeal."

On 13 November 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had accepted the JAB's recommendation.

On 30 May 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The decision not to select the Applicant for the P-4 post in question, in favour of a less qualified candidate, was discriminatory and motivated by prejudice and bias against him.

Whereas the Respondent's principal contention is:

Promotion is within the discretion of the Secretary-General. The decision not to select the Applicant for promotion was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 17 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant contends that the decision not to select him for the post of Chief, Traffic Unit, for which he applied, was arbitrary, discriminatory and an abuse of the Respondent's authority, since the Applicant was more senior in grade and had much more relevant experience than the selected candidate. He also asserts that his qualifications and favourable performance reports were not given sufficient consideration in the selection process. The Respondent contends that the Applicant had no right to be selected for the post in question and that he was given full and fair consideration under the relevant placement and promotion procedures.

II. The Tribunal first considered the Applicant's allegation of discrimination and abuse of authority. The Tribunal recalls its jurisprudence holding that the Secretary-General has broad discretion in matters of promotion and selection for posts. (Cf. Judgements No. 134, Fürst (1969); No. 312, Roberts (1983); No. 362, Williamson (1986); No. 444, Tortel (1989)). The Tribunal has also held that it can neither substitute its own assessment of the Applicant's merits for the judgement of the Secretary-General (Cf. Judgement No. 566, Ahmed (1992)) nor examine an applicant's claims that his or her qualifications are superior to those of the selected candidates (Cf. Judgement No. 538, Al-Atraqchi (1991)). Notwithstanding the foregoing, the Secretary-General's decision may be vitiated by evidence demonstrating that it was tainted by lack of due process, a breach of procedure or the influence of extraneous factors, such as prejudice or discrimination. The burden is on the Applicant to produce such evidence (Cf. Judgement No. 581, Narula (1992)). However, the Tribunal finds that the Applicant has failed

to adduce the necessary proof to substantiate his claim of discrimination and abuse of authority.

III. The Tribunal next examined whether the Applicant's candidacy for the post had been given full and fair consideration. The Tribunal concurs with the finding of the JAB that the appointment and promotion bodies had before them all the necessary documentation to assess the Applicant's merits in respect of the vacancy; that the selection process had been correctly handled and that the Applicant had been properly considered.

IV. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mikuin Leliel BALANDA
Vice-President, presiding

Mayer GABAY
Member

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
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AT

Administrative Tribunal

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1 August 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 830

Case No. 929: ANIH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mikuin Leliel Balanda, Vice-President; Mr. Mayer Gabay;

Whereas, on 3 January 1996, Clement O. Anih, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 14 June 1996, the Applicant, after making the necessary corrections, again filed an application requesting, inter alia, the Tribunal to order:

"...

(4) ... UNICEF to rescind their purported termination of my appointment and ... to reinstate me into the service, paying me arrears of all my entitlements up to and including the date of such reinstatement and thereafter as they become due.

(5) ... UNICEF to pay me compensation in the sum of $300,000 (Three hundred thousand US dollars) for the injury sustained by me in the event that the Secretary-General decides to pay me compensation. ...

...

(6) Any other orders or declarations that the Tribunal may deem appropriate."

Whereas the Respondent filed his answer on 26 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 May 1992, on a two year fixed-term contract, as Secretary in the Programme Section of UNICEF, in Kaduna, Nigeria, at the GS-4, step I level. His contract was not renewed beyond its expiration date of 31 May 1994, on grounds of misconduct.

On 30 April 1993, the Zonal Programme Officer at the UNICEF Office in Kaduna, wrote to the Chief of Operations at the UNICEF Office in Lagos, concerning the theft of six cartons of Toyota Hilux spare parts and medicine tablets from the UNICEF store. The Zonal Programme Officer attached to his memorandum a report of an investigation carried out by three UNICEF staff (hereinafter the Investigation Report). The Investigation Report stated that a Security Guard had "noticed suspicious movement" of the Applicant and the driver of the vehicle who left the office premises after loading cartons from the store. The report, signed on 30 April 1993, concluded that "[the Applicant] has been involved in stealing office property". The Zonal Programme Officer recommended that the Applicant be dismissed with "immediate effect".

The driver of the car, in a statement made for the investigation, reported that, on two occasions, he had been asked by the Applicant to help transport cartons from the store to the Applicant's house. The driver had asked the Applicant what was in the cartons but was told not to question a "superior officer". The driver was asked to repeat his statement in front of the Applicant, who denied any involvement.

On 11 May 1993, the Senior Operations Officer, Lagos, wrote to the Applicant, suspending him with pay until further notice and asking him to defend himself, in writing, against the allegations of theft. The Applicant responded on 18 May 1993, stating that he had been targeted for victimization by his supervisor in retaliation for

applying for another position in the Organization without first consulting her. The Applicant submitted additional explanations in his defense on 19 July and 19 August 1993. Attached to the latter memorandum, the Applicant provided a statement of the driver, dated 6 August 1993, to the effect that the allegations of misconduct against the Applicant had been planned by a Finance Assistant with the Kaduna Zonal Office in order that the Finance Assistant might gain full responsibility for Administration and Finance.

On 3 September 1993, the UNICEF Representative in Lagos informed the staff of UNICEF that he had established an ad hoc disciplinary committee (ad hoc JDC) to investigate the loss of spare parts and mectizan medicine tablets in the Kaduna Office. The ad hoc JDC submitted its report to the Representative on 24 September 1993. It concluded that the Applicant was "the number one suspect" in the theft of spare parts and recommended his summary dismissal. It did not reach a conclusion with respect to the medicine tablets.

In a letter dated 2 May 1994, the Deputy Executive Director (Operations) transmitted to the Applicant an excerpt of the Committee's report pertaining to him, noting from its findings and supporting documentation:

> "(a) That several persons testified that they saw you removing cartons from the store,
>
> (b) That during the questioning you stated that you had never taken the store keys, yet in your statement of 7 May, you contradicted yourself by admitting to having taken the keys,
>
> (c) That the supplier who was questioned as to whether you tried to sell him spare parts, while denying the allegation, did say that he inflated the invoice amounts to benefit you."

She further informed the Applicant as follows:

> "On the basis of all the evidence presented, I have decided, on behalf of the Executive Director, to accept the

> recommendation of the JDC [Joint Disciplinary Committee] that you be separated from service in accordance with staff regulation 10.2 and staff rule 110.3(vii). We note that your fixed-term appointment expired on 30 April 1994. Therefore, your separation will be effective c.o.b. [close of business] the date you receive this letter."

On 27 June 1994, the Applicant appealed the foregoing decision to the Deputy Executive Director (Operations), requesting further review. On 14 October 1994, the Director, Division of Personnel, replied that the decision was final.

On 14 June 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The composition of the ad hoc JDC reflected prejudice and was calculated to frustrate the Applicant's ability to defend himself.

2. The ad hoc JDC, by denying the Applicant access to one of the witnesses against him, infringed the Applicant's right to a fair hearing.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters. This includes determinations of what constitutes misconduct warranting dismissal.

2. The Secretary-General's decision to dismiss the Applicant was a valid exercise of his discretionary authority.

3. The Applicant's dismissal was preceded by an investigation which afforded him a reasonable opportunity to present his version of events.

The Tribunal, having deliberated from 11 July to 1 August 1997, now pronounces the following judgement:

I. On 30 April 1993, the Zonal Programme Officer mentioned for the first time that the Applicant had been "reportedly involved in [the] theft [of a] case ... [of] six cartons of vehicle spare parts". He held some preliminary enquiries together with two of his colleagues and concluded that "unless there [is] any other concrete evidence in favour of [the Applicant] I would recommend dismissal from service with immediate effect". From then on, the investigation was widened, culminating in the establishment of an ad hoc Joint Disciplinary Committee (ad hoc JDC) to investigate also "the loss of spare parts and Mectizan tablets in Kaduna".

II. After an investigation, the ad hoc JDC recommended the Applicant's "summary dismissal for misconduct, illegal use of UNICEF vehicle, theft of documents and insubordination". The Respondent dismissed the Applicant and also the office driver (Cf. Judgement No. 756, Obimba (1996)) as the persons most closely associated with the loss or theft of the six cartons of vehicle spare parts. The driver's appeal before the Tribunal was rejected on 16 July 1996.

III. The Applicant's main contention is that the evidence on which the Respondent separated him from service was wholly inadequate and often tainted. He further argues that he was not given a suitable opportunity to defend himself, to which he was entitled. He also asserts that he was a victim of a conspiracy in which his supervising officer was implicated; he objects, therefore, to the inclusion of this officer as a member of the ad hoc JDC.

IV. Having examined all the evidence before it, the Tribunal rejects the Applicant's allegation that the inclusion of his supervising officer in the ad hoc JDC was prejudicial to his interests. The Applicant produces no evidence to support this claim. Furthermore, he did not object to the composition of the ad hoc JDC when it was first established.

V. As regards the evidence before the ad hoc JDC, the Tribunal considers that some of it is contradictory. Nonetheless, the Tribunal has not found any convincing evidence of a conspiracy, and much less of a vendetta. Some of the deficiencies in the evidence arose, it seems, from the unsatisfactory arrangements and working conditions in the UNICEF office at Kaduna. The ad hoc JDC has referred to these deficiencies and the need to correct them. Besides, the evidence by individual witnesses was often coloured by their own motivation and frequently by significant lapse of time. The Respondent has acknowledged that the report of the ad hoc JDC is not as comprehensive as the professional reports of joint disciplinary committees established at Headquarters, which are serviced by a full-time secretary, who often is a lawyer, and staff. Despite all these shortcomings, the Tribunal holds that the conclusions reached by the ad hoc JDC are reasonable and are supported by the evidence, notwithstanding the limitations and the circumstances in which it worked. The Tribunal finds no reason to disagree with any of the conclusions reached by the ad hoc JDC.

VI. The Applicant's complaint that he was not afforded a suitable opportunity to defend himself or to cross-examine witnesses may appear, at first glance, to be justified, inasmuch as the Applicant was not fully informed in time of the course of developments in his case. Even allowing for the fact that some of the delays were of his own making, the Tribunal notes that, in some instances, the Applicant could legitimately believe that he was denied the full protection of the Staff Regulations and Rules because of the Administration's failure to adhere strictly to them. However, the Tribunal considers that these lapses were minor and occasional. In the view of the Tribunal, they did not fundamentally affect the interests of the Applicant.

VII. The shortcomings and deficiencies referred to above could invite criticism or even admonition of the Respondent. Nonetheless, the Tribunal finds that the course of justice was neither deflected nor perverted by the way in which the findings of the ad hoc JDC were reached, or by the Respondent's action based upon them. In this context, the Tribunal notes the numerous and frequent letters the Applicant addressed to the Respondent giving his version of what transpired. The Respondent's replies, as well as the files before the Tribunal, indicate that the concerns of the Applicant on various matters were addressed and attended to. In sum, the Tribunal holds that the Applicant had many occasions to present his case fully and that his rights and opportunity to defend himself were not infringed upon by the Respondent in reaching his decision to separate him.

VIII. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
First Vice-President, presiding

Mikuin Leliel BALANDA
Second Vice-President

Mayer GABAY
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/831
1 August 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 831

Case No. 876: AL-SHAMI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, First Vice-President, presiding; Mr. Mikuin Leliel Balanda, Second Vice President; Mr. Mayer Gabay;

Whereas at the request of Jamal Al-Din Al-Shami, a former staff member of the United Nations Development Programme, (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal until 31 July 1994;

Whereas, on 19 June and 11 October 1994, the Applicant filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, again extended the time-limit for the filing of an application with the Tribunal until 30 November 1994 and 31 March 1995;

Whereas, on 29 March 1995, the Applicant filed an application requesting the Tribunal, inter alia, to:

"...

3. Reinstat[e] me in my post and [award] a fair compensation [for] the period of joblessness.

...

5. Due to [the] situation in Iraq and non-acceptability of our currency by any body outside Iraq, and [the fact that the] transfer of money [is] illegal, I request that I be allowed to pay the fees of an outside lawyer in local currency through UNDP Baghdad."

Whereas the Respondent filed his answer on 12 March 1996;

Whereas, on 8 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions;

Whereas, on 11 and 12 November 1996, the Respondent wrote to the Tribunal concerning the questions referred to above and, inter alia, requested an extension of the time-limit in which to respond to the questions, given technical difficulties encountered in obtaining information;

Whereas, on 15 November 1995, the President of the Tribunal ruled that the case would be adjourned until the next session of the Tribunal;

Whereas, on 15 March 1997, the Respondent provided the Tribunal with the answers to the questions posed on 8 November 1996;

Whereas the facts in the case are as follows:

On 1 February 1990, the Applicant entered the service of UNDP in Iraq under a Special Service Agreement (SSA) as a Principal Assistant for administrative support functions; the Applicant served on SSAs until October 1990. On 1 October 1990, he was appointed to the post of Senior Administrative Assistant at the G-7, step IV level, on a three-month, fixed-term appointment. On 1 January 1991, his appointment was extended for one year and, subsequently, by another month, until 31 January 1992, the date on which he was separated.

On 17 October 1991, the Applicant wrote to the UNDP Resident Representative in Iraq, requesting a change in his status from General Service to Professional. The Applicant claimed that for

more than a year, there had been no sign of any change of his status and that therefore, "[f]or the above reasons, while I will continue to honor the gentlemen's understanding we had in the meeting of 28.1.1990, I would like to change my work from administration to other areas more in line with my experience and qualifications. If for any reason this is not possible, then I would request termination of my services on 31 May 1992."

The Resident Representative sent letters to UNDP in New York, the United Nations Educational, Scientific and Cultural Organization (10 February 1991) and the UN Department of Technical Cooperation for Development (27 July 1991), attaching a copy of the Applicant's personal history and references, in an effort to obtain for the Applicant a professional position.

On 11 November 1991, the Resident Representative replied to the Applicant's memorandum of 17 October 1991, informing him that "... on exceptional grounds, to enable you [to] avail your[self of] 3 months' salary bonus as maximum leave salary in convertible currency, I have approved extension of your present contract by one month, up to 31 January 1992." On 31 January 1992, the Applicant was separated from service.

On 29 July 1992, the Applicant wrote to the Administrator, UNDP, requesting a review of the decision not to extend his contract. In a reply dated 13 October 1992, the Chief, Legal Section, UNDP Division of Personnel advised the Applicant that "the decision taken in your case was in conformity with the terms of your appointment and the relevant staff rules."

On 26 March 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 15 February 1994, the JAB adopted its report. Its considerations, conclusions and recommendations read as follows:

"Considerations

17. The Panel noted that the case before it resulted from a situation in which the Appellant himself, in his letter of 17 October 1991 to the Resident Representative, requested to be separated from service on 31 May 1992 since his office functions had not been changed from administration into other areas in line with his experience and qualifications (...).

18. The Panel had to determine the validity of Appellant's claim that the decision taken by the Resident Representative to separate him from service was tainted by bias and, as was contended by the Appellant, the letter was only used as a pretext to do so.

19. In this context the Panel noted the Respondent's contention that the Resident Representative had acted within his authority in separating the Appellant upon the expiration of his existing fixed-term appointment, particularly in light of the Appellant's letter. Furthermore, there was no obligation to separate the Appellant on the date requested by him.

20. The Panel also considered the question of whether a promise to give the Appellant a post at the professional level had been made. In this context the Panel examined the Resident Representative's comments in which he explained that the intention was only to provide the Appellant with a chance to compete for the National Professional Officer (NPO) post, not to promise him the post. The Resident Representative stated that 'in fact, [the Applicant] was provided with a great advantage over those who would have competed for the post by providing him with an opportunity to apply as an internal candidate already familiar with the organization and its working methods.' The Resident Representative further explained that, as a result of the sanctions against Iraq and the subsequent freezing of the Programme, the NPO post for which the Appellant was expected to compete, was not to be filled.

21. The Panel also considered the Appellant's contention that the decision to separate the Appellant had been taken because of the allegations made by him regarding misconduct on the part of the Resident Representative. In examining the report on that subject submitted by the UNDP's Internal Audit (...), the Panel noted the statement made by the Director, Division for Audit and Management Review, namely, that the

report clearly indicated that the allegations were either unsubstantiated or did not provide any evidence which would lead to the confirmation of their validity.

Conclusions and Recommendations

22. The Panel found that the Appellant did not submit convincing evidence that the Resident Representative had promised him a professional post. In the absence of persuasive evidence to the contrary, the Panel found that the explanation given by the Resident Representative on the above-mentioned alleged promise [was] plausible and convincing.

23. The Panel further found that there was no convincing evidence that the decision in question was tainted by bias. The Panel felt that in this case the Resident Representative took the Appellant at his word and therefore did not extend his contract.

24. Accordingly, the Panel recommends that the appeal be rejected."

On 25 February 1994, the Officer-in-Charge, Department of Administration and Management, informed the Applicant as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has noted the Board's findings that your claim that you were promised a future professional post, and your allegation that the decision not to renew your fixed-term appointment on its expiration on 31 January 1992 was tainted by bias were both unsubstantiated. He has also noted its recommendation that your appeal be rejected. The Secretary-General has therefore decided to take no further action in respect of your appeal".

On 29 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The decision not to renew the Applicant's appointment was biased as it was based on the UNDP Resident Representative's negative personal attitude towards him.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of his fixed-term appointment.

2. The decision not to renew the Applicant's contract was not vitiated by extraneous factors.

The Tribunal, having deliberated from 15 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant's initial appointment was a three-month fixed-term appointment, which was extended by one year and, subsequently, by a month. The Applicant was separated on 31 January 1992.

By memorandum of 17 October 1991, to the Resident Representative, the Applicant requested a change of his status to "professional" and added that, if this were not possible, he would request termination of his services with effect from 31 May 1992. The memorandum referred to "very encouraging responses" from the Resident Representative and his Deputy to the Applicant's "desire to leave his Government post and to work with UNDP, if a professional post could be made available." The memorandum also refers to assurances, allegedly given by the Resident Representative to the Applicant, of a successful future for him in the service.

II. In response to the memorandum of 17 October 1991, the Resident Representative approved an extension of the Applicant's appointment for one month, to 31 January 1992. The reason for this extension is not clear, but the Respondent stated that it was being done "on exceptional grounds, to enable [the Applicant to] avail [himself of] three months' salary bonus, as maximum leave salary, in convertible currency."

The Applicant argues that the assurances given to him were such that he expected to be reappointed. He further asserts that he had given up his post with his Government because of these assurances.

III. The Tribunal finds no evidence that assurances were given. The Applicant's resignation from his Government post is not, of itself, sufficient to establish that he received such assurances and no other evidence was found.

IV. Similarly, letters written by the Resident Representative to the Director of Personnel, which supported the Applicant in his quest for an international post, do no more, on the face of them, than show an attempt by the Resident Representative to assist the Applicant.

V. Therefore, in the absence of evidence, the question of the effect of assurances of the kind described by the Applicant vis-à-vis renewal of his contract does not arise for consideration.

The Applicant also contends that his contract was not renewed because of bias on the part of the Resident Representative. The thrust of this part of the Applicant's case is that he revealed irregularities by the Resident Representative in the conduct of his work. Inquiries by the Tribunal however showed that there was no basis for such allegations. On the other hand, evidence shows that the Respondent was helpful to the Applicant at all stages. Therefore, allegations of bias or prejudice cannot, in the view of the Tribunal, be sustained.

VI. As the holder of a fixed-term contract, the Applicant, did not have a right to renewal of that contract. In the circumstances, to succeed in his pleas, the Applicant would have to show, at a minimum, that the making of allegations resulted in his exclusion

from any consideration for renewal which he, otherwise, would have been afforded. The Applicant has failed to do this.

VII. The Tribunal therefore rejects the application in its entirety.

(Signatures)

Samar SEN
First Vice-President, presiding

Mikuin Leliel BALANDA
Second Vice-President

Mayer GABAY
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/832
1 August 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 832

Case No. 904: DE'BES
KAYYALI
DIAB

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Samar Sen, Vice-President; Mr. Julio Barboza;

Whereas, on 20 November 1995, Inzihar Abdul Razzaq De'bes, Siham Rafiq Kayyali and Siham Mahmoud Diab, former staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency) filed an application containing pleas which read, in part, as follows:

"...

a. Respondent should reinstate [the Applicants] to suitable vacancies (teaching) as available to him.

b. Applicants should be paid [a] termination indemnity for years of qualifying service prior to their resignation, which did not mature at the time of Applicants' resignation.

c. Payment of secretarial fees estimated at US$ 500."

Whereas the Respondent filed his answer on 5 June 1996;

Whereas the Applicants filed written observations on 22 February 1997;

Whereas the Respondent submitted comments on the Applicants' written observations on 20 April 1997;

Whereas the facts in the case are as follows:

The Applicant De'bes entered the service of the Agency, as an area staff member, on 27 April 1970, on a temporary indefinite appointment, as a Teacher "E", at the grade 5, step 6 level. She resigned from the Agency for health reasons, with effect from 30 September 1990.

On 28 June 1994, the Applicant De'bes wrote to the Director of UNRWA Affairs, Syrian Arab Republic (the Field Director), seeking reinstatement. In a reply dated 4 July 1994, the Field Administration Officer, on behalf of the Field Director, advised her that she did not meet the age conditions specified in the vacancy notice.

On 24 August 1994, the Applicant De'bes lodged an appeal with the Joint Appeals Board (JAB), seeking reinstatement into the service of the Agency.

The Applicant Kayyali entered the service of the Agency, as an area staff member, on 5 October 1963, on a temporary indefinite appointment, as a Teacher "E", at the grade 5, step 1 level. She resigned from the Agency for unstated reasons with effect from 30 November 1985.

On 29 June 1994, the Applicant Kayyali wrote to the Field Director seeking reinstatement. In a reply dated 4 July 1994, the Field Administration Officer, on behalf of the Field Director, advised her that she did not meet the age conditions specified in the vacancy notice.

On 21 August 1994, the Applicant Kayyali lodged an appeal with the JAB, seeking reinstatement into the service of the Agency.

The Applicant Diab entered the service of the Agency, as an area staff member, on 29 October 1963, on a temporary indefinite appointment, as a Teacher, at the grade 5, step 1 level. She resigned from the Agency for health reasons with effect from 31 August 1986.

On 30 June 1994, the Applicant Diab wrote to the Field Director seeking reinstatement. In a reply dated 4 July 1994, the Field Administration Officer, on behalf of the Field Director, advised her that she did not meet the age conditions specified in the vacancy notice.

On 14 August 1994, the Applicant Diab lodged an appeal with the JAB, seeking reinstatement into the service of the Agency.

The JAB adopted its reports on each of the Applicants' appeals on 14 July 1995. In each case, the JAB's evaluation and recommendations read as follows:

"a. By reference to the appeal and to the Appellant's observations dated 28 April 1995, the Board noted the Appellant's contention that she had been applying continually for reinstatement within and after the three years that followed her resignation and that her applications were not received at all by the officials concerned on the grounds that she was over 35 years of age.

b. By reference to the Administration's reply, the Board noted the Administration's contention that 'in addition to being time-barred as a result of non-compliance with the time limits stipulated by area staff rule 111.3, the Appellant is precluded from appealing by laches'; and that (2) 'there has been no non-observance of the Appellant's terms of appointment, including all pertinent regulations and rules'.

c. The Board noted the provisions of paragraph 3.6, Part VI of personnel directive A/4 which was in effect at the time of the Appellant's resignation and at the material time of the appeal, and found that it read as follows:

'Teachers who have resigned from the Agency's service to accept other teaching posts within the Middle East, and who apply for re-employment by reinstatement within three years from the date of their resignation, will be given priority over new candidates who are equally qualified.'

The Board here notes that this rule requires two conditions in order to give priority over equally qualified candidates to teachers who are seeking reinstatement in the Agency's service. Those two conditions are:

(1) that the reason for the teacher's resignation be 'to accept other teaching posts in the Middle East', and

(2) that the request for reinstatement be submitted within three years from the date of the resignation.

By reference to the Appellant's personal file, the Board noted that the Appellant had resigned for health reasons [in the case of the Applicant Kayyali, for personal reasons], as stated in her letter of resignation dated 30 September 1990 [on 30 November 1985, in the case of the Applicant Kayyali, and on 31 August 1986, in the case of the Applicant Diab].

Furthermore, the Board could not find any record or documentation in the Appellant's personal file to prove that the Appellant requested reinstatement in the Agency's service within the three years that followed her resignation nor did the Appellant adduce evidence to that effect [in the case of the Applicant Diab, the report read as follows: 'The only evidence adduced to that effect is a handwritten letter dated 9 September 1986, i.e., nine days after the date of the Appellant's resignation. This letter was submitted by the Appellant as an annex to her letter of observations dated 2 May 1995. The Board is of the opinion that said letter is not acceptable evidence'].

In this context, the Board resolved that the conditions stipulated in paragraph 3.6, Part VI of personnel directive A/4 have not been fulfilled in the case of the Appellant, as (a) she resigned for reasons other than accepting a teaching post in the Middle East,

> and (b) no evidence has been adduced to prove that the Appellant requested reinstatement in the Agency's service within the prescribed time of the said paragraph.
>
> IV. RECOMMENDATIONS
>
> 14. In view of the foregoing, and without prejudice to any further oral or written submission to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against, and that the case be rejected."

On 14 August 1995, the Commissioner-General transmitted a copy of each JAB report to the Applicant concerned and informed her as follows:

> "You will note that the Board found that you did not satisfy the stipulations of paragraph 3.6, Part VI of personnel directive A/4 and has therefore recommended that the Administration's decision be upheld and your appeal be dismissed.
>
> I have carefully reviewed the Board's report and agree with its conclusions and recommendations. Your appeal is therefore dismissed."

On 20 November 1995, the Applicants filed with the Tribunal the application referred to above.

Whereas the Applicants' principal contentions are:

1. One of the members of the JAB Panel that ruled on the Applicants' case should have been disqualified; therefore, the ruling of the JAB was tainted.

2. The Applicants are entitled to priority for re-employment with the Agency, pursuant to personnel directive A/4, paragraph 3.6.

3. The Applicants are entitled to a termination indemnity in consideration of their many years of service with the Agency.

Whereas the Respondent's principal contentions are:

1. The Applicants have produced no evidence to show that the Chairman of the JAB abused his discretion by failing to disqualify a member of the JAB from considering the Applicants' appeals.

2. The Applicants have not met the requirements of personnel directive A/4 for priority for re-employment since they did not resign to accept other teaching posts in the Middle East.

3. The Applicants' request for payment of a termination indemnity is precluded by both the Area Staff Rules and the legal doctrine of laches.

The Tribunal, having deliberated from 4 July to 1 August 1997, now pronounces the following judgement:

I. The Applicants De'bes, Kayyali and Diab, all former teachers with the Agency, resigned on 30 September 1990, 30 November 1985 and 31 August 1986, respectively, and all applied for reinstatement in June 1994. The cases have similar fact patterns and were presented in one application. Accordingly, the Tribunal considers them together.

II. At the time of each Applicant's resignation, personnel directive A/4, Part VI, paragraph 3.6 governed re-employment of teachers with the Agency. It provided as follows:

> "Teachers who have resigned from the Agency's service to accept other teaching posts within the Middle East, and who apply for re-employment by reinstatement within three years from the date of their resignation, will be given priority over new candidates who are equally qualified."

Thus, there were two conditions for obtaining priority for reinstatement. The first was that teachers who had resigned from the Agency's service must have done so in order to accept another teaching post in the Middle East. The second was that the request for reinstatement must have been made within three years from the date of resignation.

III. With respect to the first condition, the Tribunal notes that, at the time of their resignations, the Applicants De'bes and Diab stated that they were resigning for health reasons. This does not encourage the Tribunal to believe that their real intention was to accept offers of other teaching posts in the Middle East. All the Applicants have provided letters documenting their unsuccessful applications for other teaching posts in the Middle East. The Tribunal finds, however, that these letters do not meet the first condition of personnel directive A/4 set out above. The Applicant Kayyali did not state the reasons for her resignation at the time it was tendered, but has offered no proof that other teaching posts had been offered to her at the time of her resignation. Indeed, the letter she produced to establish her attempts at finding another teaching post suggest that she may not have been employed as a teacher subsequent to her resignation and hence did not resign from the Agency to accept another teaching post.

IV. With respect to the second condition, the Tribunal notes that, in all three cases, more than three years had elapsed between the Applicants' respective dates of resignation and their requests for reinstatement. Further, the Applicants have presented no

evidence to prove their contention that they "repetitively" applied for reinstatement within the required three year period; nor is there any such evidence in the Agency's files. In addition, the Applicants have produced no evidence to support their allegations that their requests for reinstatement with the Agency were not registered because they did not meet the required age limit.

V. As to the Applicant Diab's "withdrawal of resignation" dated 9 September 1986, in which she states that "conditions forced [her] to resign" nine days previously and requests withdrawal of the resignation, the Tribunal notes the absence of an official seal from the former Area Education Officer on the document. In addition, the Applicant adduces no evidence to support her contention that she was forced to resign, and apparently has forgotten the initial alleged cause of her resignation, namely health reasons. The Tribunal will not enter into the question of the letter's authenticity. Once the Applicant resigned - and her resignation was accepted - the relationship between her and the Agency was severed and she could not withdraw the resignation. In any case, the Tribunal finds that this issue is not material since the Applicant did not fulfil the first condition necessary for obtaining priority reinstatement: that of resignation in order to accept another teaching post in the Middle East. The Tribunal fully concurs with the Joint Appeals Board's recommendation to uphold the Commissioner-General's decision.

VI. The Tribunal now considers the Applicants' claim for a termination indemnity in consideration of their years of service with the Agency prior to their resignations. The Tribunal finds that none of the Applicants raised this issue before the JAB and, in accordance with the Tribunal's jurisprudence, the issue is not properly before the Tribunal (Cf. Judgement No. 624, Muhtadi (1993)).

VII. For the foregoing reasons, all the Applicants' pleas are rejected, including the Applicants' request for costs.

(Signatures)

Hubert THIERRY
President

Samar SEN
Vice-President

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary